IN THE

Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-1410

JAMES WILLIE POINDEXTER,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

On Appeal from the Texas Court of Criminal Appeals

JURISDICTIONAL STATEMENT

CLARK GABLE WARD
1410 One Allen Center
Houston, Texas 77002
Attorney for Appellant

(APPEAL ONLY)

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

LIST OF AUTHORITIES

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JURISDICTIONAL STATEMENT

Petitioner appeals from the judgment of the Texas Court of Criminal Appeals, entered on January 7, 1976, affirming the judgment of the 185th District Court of Harris County, Texas, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, the highest Court of Appellate criminal jurisdiction in Texas, is unpublished in 532 S.W.2d 350. The opinion is attached hereto as an exhibit.

JURISDICTION

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. 1257 (1), (2), sino in the court below there was drawn into question the validity of a state [statute] custom and useage on the ground of its being repugnant to the Constitution . . . or laws of the United States, and the decision below was in form of its validity. The following decision of this Court sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Hammond v. Wittredge,* 204 U.S. 583, 51 L.Ed. 606, 27 S.Ct. 396 (1907); *Honeymen v. Hanon,* 300 U.S. 14, 81 L.Ed. 476, 57 S.Ct. 530 (1937); *Powell v. Brunswick County,* 150 U.S. 433, 37 L.Ed. 11, 34, 14 S. Ct. 166 (1893); *Fiske v. Kansas,* 274 U.S. 380, 71 L.Ed. 1108, 47 S.Ct. 655; *Smith v. Texas,* 311 U.S. 128, 61 S.Ct. 164 (1940); *Eubanks v. Louisiana,* 356 U.S. 584 (1958); *Akins v. Texas,* 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945); *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1733, 18 L.Ed.2d 943 (1967); *Agnello v. United States,* 269 U.S. 20 (1925); *Agurlar v. Texas,* 378 U.S. 108.

QUESTIONS PRESENTED

1. Whether the Fourth Amendment may be invoked to exclude from evidence the fruits of a search of Petitioner's business made without a search warrant and 30 hours after Petitioner's arrest and detention.

2. Whether the systematic exclusion of an identifiable group from consideration for Grand Jury duty denies the Petitioner due process and equal protection of the law.

STATUTES INVOLVED

TEXAS CODE OF CRIMINAL PROCEDURE—Articles 19.01, 19.06, 18.01, 18.06, 18.09, 18.13.

The Fourth Amendment to the Constitution of the United States.

Texas Penal Code, Article 726(d).

STATEMENT

The Petitioner was charged by indictment with the sale of a narcotic drug, Amidone to one F. C. Miller, an officer of the Houston Police Department, Narcotic Division. Officer Miller testified that on several occasions he visited the office of one Samuel George, M.D., obtaining prescriptions which were filled at a pharmacy operated by the Petitioner. Miller testified that he had received information from informants that Dr. George would prescribe drugs with only a limited examination and that such prescriptions could be filled at the Petitioner's business. Further, he testified that he received some form of examination from Dr. George, however he insisted that it was not a complete examination as required by Law. On cross-examination, however, Officer Miller testified that he did not know the elements of a complete examination.

Based upon these prescriptions the Petitioner was charged with selling and delivering the narcotic drug Amidone. He was subsequently indicted and arrested on the basis of the indictment.

After the Petitioner was arrested and placed in the County Jail, and prior to the time he was admitted to bail (a period of approximately 30 hours) Officers of the Texas Department of Public Safety along with an Assistant District Attorney of Harris County obtained from the 182nd District Court an Order to audit the Petitioner's premises. This Order was based on a document entitled *"States Application for Order"* which is attached as Appendix "B". It was unsworn or otherwise verified. On the basis of this "Order" the Officers along proceeded to the Petitioner's place of business; made a surreptitious entry with assistance from a Police locksmith; conducted a search and used the prescriptions confiscated as evidence against the Petitioner in this action. The Officers confiscated over 4500 prescriptions which were admitted as evidence over Petitioner's timely objections. Petitioner moved to suppress the evidence in the Court of first instance since the search was not incident to his arrest and was made without a warrant, and in violation of the Fourth Amendment to the Federal Constitution and in conflict with prior decisions of this Court. Following approximately 4 hours of testimony the Court denied the motion and admitted 3800 of the prescriptions in evidence.

On the basis of this evidence Petitioner was found guilty and assessed punishment of 10 years confinement.[1]

Petitioner filed a timely Motion to Quash the indictments and appended in support thereto a most exhaustive Memorandum of Authorities covering all the pertinent decisional law in point. At the hearing on this Motion in the Court of first instance Petitioner produced as witnes-

1. In a subsequent action arising out of the same incident Petitioner received a 45 year sentence which is now pending on Appeal.

ses two of the Jury Commissioners who selected the Grand Jury which returned the indictments. The testimony of these witnesses is reproduced in the record now on file with the Clerk of this Court. The testimony of Jury Commissioner W. J. WARD is sufficiently relevant to be summarized here. Mr. Ward was the Chairperson of the Commission. He stated, essentially, that he selected Grand Jurors whom he knew; those whom he knew to have good judgment, over 40 years old, and "stable." By "stable", he testified that he meant successful businessmen. Commissioner Ward testified that he had never selected a Mexican American since he "did not know any to select." He said he had never selected a Domestic Worker but he had selected one laborer, his waiter at his Club. He said he would *NEVER* (emphasis Petitioner's) select a person between the age of 18 and 40.

Mr. Ward testified that he felt he was under a duty to slect only the persons he knew personally.

The gravamen of the Motion to Quash was that the Grand Jury which returned the Indictments was impanelled improperly and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution.

Following a lengthy hearing the Trial Court denied the Motion to Quash to which the Petitioner duly excepted.

The ruling of the Court denying the Motion appears in the Record. On review the Court of Criminal Appeals affirmed. The opinion is attached as Appendix "A".

THE QUESTIONS ARE SUBSTANTIAL

The principle issues involved in this appeal are identical to those raised in *Preston v. United States,* 376 U.S.

364, 11 L.Ed.2d 777, 84 S.Ct. 881 (1964), in which an appeal was taken from the admission of evidence seized in the search of an automobile after the Petitioner had been placed in custody. This Court held the search invalid in the absence of a search warrant since the Petitioner was already in custody and the subsequent search at another was not incident.

Petitioner here concedes that if his business records had been seized at time of his arrest it probably would have been properly admissible; however, the state was unable to state why the search was not made at that time. The subsequent search and seizure is clearly in conflict with *Preston, supra.*

1. In a recent case this Court upheld a past custody search, *United States v. Edwards,* 415 U.S. 800, 39 L.Ed. 2d 771, 94 S.Ct. 1234 (1974); however, there is at least one or more essential, distinction between *Edwards, supra* and this Appeal. In *Edwards, supra,* the clothing searched was in the custody of the Police but in this Appeal the Police returned to the premises and made a forced entry without the sanction of a search warrant. That is, the normal process of arrest and detention had been completed and a search and seizure 30 hours later is clearly not incident to such arrest and detention. *Stoner v. California,* 876 U.S. 483, 11 L.Ed.2d 856, 84 S.Ct. 889, *Preston, supra; See v. City of Seattle,* 87 S.Ct. 1737, 387 U.S. 541, 18 L.Ed.2d 943 (1967).

The Respondents assert as authority for the post detention search and seizure an instrument called *"States Application for Order"*, which is attached hereto as Appendix "B". The Order fails to comply with even the minimum requirements of the Texas Code of Criminal Procedure. It is unsworn; contains no affidavit of the Applicant or any other party; Article 18.09, 18.13, Texas Code of Criminal Procedure. Clearly the documents fall short of the requirements of the Fourth Amendment. Moreover, the search fails to come with the well delineated exceptions to the warrant requirements of the Fourth Amendment approved and enunciated by this Court in the:

a) Automobile Exception—Carroll v. United States, 267 U.S. 132, 69 L.Ed. 543, __ S.Ct. 280 (____) 39 A.L.R. 790

b) The Plain View Exception—*Coolidge v. New Hampshire,* 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1974)

c) Other exigent circumstances such as probable cause —*Coolidge, supra.*

d) Consent—*Schnecklath v. Bustamante,* 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973)

See v. City of Seattle, supra, involved the inspection of commercial premises absence a search warrant. The Court remarked over the administrative subpoena of corporate books and records. "We find strong support in these subpoena cases for our conclusion that warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises," p. 544 cases cited therein. The basis of the holding of *See, supra,* was that the inspectors were actually seeking criminal violations and a search warrant was required. In the case at bar the inspection of Petitioner's records were not the result of a decision to conduct a routine periodical inspection during business hours. Rather this search was prompted by complaints that had been received about Petitioner's activity. Although the complaints have not been set forth

in the record. they apparently raised serious question in the minds of the authorities who received them. There can be no doubt the sole reason for the officers subsequent forcible entry and return search after an earlier arrest was to obtain evidence fo ra criminal prosecution. Which is clearly contrary to the teaching of *See, supra.*

2. It is a well settled principle of law that the grand jury, as well as the petit jury, must be representative of a cross-section of the community. *Labat v. Bennett,* 365 F.2d 698 (C.A. 5, 1966); *Whitus v. Georgia, supra; Thiel v. Southern Pacific Co.,* 328 U.S. 217, 66 S.Ct. 984 (1946); *Smith v. State of Texas,* 311 U.S. 128, 61 S.Ct. 164 (1940); *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1941); *Akins v. State of Texas,* 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945); *Barrard v. United States,* 329 U.S. 187, 191 (1946).

As the court said in *Brooks v. Beto,* 366 F.2d 1, 11-12 (C.A. 5, 1966):

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community, (citing *Smith v. State of Texas, supra*). (The proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community and not the organ of any special group or class.' "

See also *Billingsley v. Clayton,* 359 F.2d 13, cert. den.. 385 U.S. 841 (C.A. 5 (1966)). In the Billingsley case the court dealt with the selection of a state grand and petit jury. The Court said: "A just and fair trial by an unbiased, unprejudiced and impartial tribunal is one of

the great American constitutional principles. There can be no 'due process' or 'equal protection' unless that principle remains inviolate. *Brown v. State of New Jersey,* 175 U.S. 172, 175, 20 S.Ct. 77, 44 L.Ed. 119 (1899); *Hayes v. State of Missouri,* 120 U.S. 68, 71, 7 S.Ct. 350, 30 L.Ed. 578 (1886); *Northern Pacific R.R. Co. v. Herbert,* 116 U.S. 642, 646, 6 S.Ct. 590, 29 L.Ed. 755 (1885)."

The Court goes on to indicate that although there is no express constitutional provision as to the classes of persons entitled to render grand and petit jury service, the law does require that qualified persons not be excluded from jury service on a class basis.

Labat v. Bennett, 365 F.2d 698 (C.A. 5, 1966) cert. den. 386 U.S. 991, was a case involving systematic exclusion of both daily wage laborers and Negroes from grand jury panels. Testimony in *Labat* showed that jury commissioners specifically excluded "daily wage earners" from the names submitted for jury duty because they felt that such persons would want to be excused for reasons of hardship. The Court found that exclusion of daily wage earners as a class violates due process and equal protection rights to an impartial jury representing a cross-section of the community. The Court said:

> "Jury service is a burden on all who serve. And of course it falls most heavily upon daily wage earners. But this segment of the community is so large and so important that a jury system without daily wage earners simply is not representative of the community."

The United States Supreme Court considered the economic exclusion problem in *Thiel v. Southern Pac. Co.,*

supra. The Appellant in that case objected to the jury panel on the grounds it was made up mostly of businessmen, whereas the general population was made up mostly of "poorer classes." The Court said:

> "Recognition must be given to the fact that these eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter."

The Circuit Court in *Brooks, supra,* quoted with favor from *Avery v. Georgia, supra,* to the effect that jury commissioners have a positive duty to select jurors so as to achieve a cross-section of the community. The *Brooks* court said that it is not enough for officials to choose those persons that they see:

> "To the contrary, the law—the very demands of the Constitution—so developed as to place a specific, tangible, identifiable burden on jury—choosing officials. It is not enough to choose from those they see. They must uncover the source of competent jury prospects from all significantly identifiable elements of the community. Innocent ignorance is no excuse.
>
> "But even more subjective is the demand that jury selectors make themselves acquainted with, not just the class, but the members of it in order to determine the identity and availability of individuals who have the qualifications for potential jurors and whose presence is required in the 'universe' to assure fair community representation."

The Court goes on to say that where different geographical areas in a municipality reflect different significant groups, such as laborers, highly educated professional, executives, those of lower incomes, and so forth,

jury selectors must first know that community. They must also know the internal structure of such area groupings sufficiently to be able to determine the identity and availability of those qualified to serve.

CONCLUSION

The Petitioner believes that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

CLARK GABLE WARD
1410 One Allen Center
Houston, Texas 77002
Attorney for Appellant

(APPEAL ONLY)

CERTIFICTE OF SERVICE

I hereby certify that on this the _____ day of April, 1976, a copy of the Jurisdictional Statement was mailed to Honorable Carol S. Vance, Criminal District Attorney of Harris County, Texas, 500 Criminal Courts Bldg., Houston, Texas 77002.

I further certify that all parties required to be served have been served.

CLARKE GABLE WARD
1410 One Allen Center
Houston, Texas 77002
Attorney for Appellant

APPENDIX "A"

NO. 50,645

JAMES WILLIE POINDEXTER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from Harris County

OPINION

Appellant was indicted for the unlawful sale of a narcotic, amidone; the jury found him guilty as charged and assessed his punishment as confinement for ten years.

F. C. Miller, an undercover agent of the Houston Police Department, acting upon information received from a reliable informant, obtained a prescription from Dr. Samuel George which he took to the police station, made a photocopy of such original, and returned to appellant's pharmacy located in the same building as Dr. George's office. Appellant declined to fill the original of the prescription until Miller produced the receipt which he had obtained for an "examination" by Dr. George.

After having the receipt in his possession, appellant filled the prescription, placed the drugs in a vial, and affixed his label thereto which showed an address for the purchaser which did not appear upon the prescription. We note, further, that the prescription was not signed by Dr. George nor were there any directions as to the use of the drug.

Without objection, the State proved that similar transactions occurred upon several occasions both before and

Upon the trial these pills were variously identified as "dolophene" and "amidone" but an expert chemist testified without contradiction the dolophene and amidone were the same narcotic drug.

Appellant was arrested on May 7, 1973, and remained in jail for approximately thirty hours before being admitted to bail. During the time appellant was in jail, the officers made an application to the district court for an order to make "inspection of all records relating to [certain drugs, including dolophene] and all record relating to barbiturates, narcotic drugs, amphetemaines [sic] and hypnotic drugs." According to this unverified motion, the order was sought under the provisions of Article 726d, Sec. 6 of the old Penal Code [now to be found in Art. 4476-14, Sec. 6, Vernon's Rev. Civ. Stat. Ann., Vol. 12B, 1974-1975 Pamphlet Supp.]. The district court granted such application and authorized the officers to enter appellant's drug store "for the purpose of examining, inspecting and copying all records there found relating to barbiturates, narcotic drugs, amphetemaines [sic] and other hypnotic drugs."

The officers, acting under such order, entered the premises and seized literally thousands of prescriptions and other records which they analyzed at their leisure before eventually returning some portion thereof to appellant's counsel.

Appellant moved to suppress the results of this search, since it was made without the issuance of a warrant but the motion was overruled.

Appellant's first ground of error is quoted:

> "The trial court erred in admitting over defendant's timely objection evidence obtained in a warrantless search of defendant's premises 24 hours after his arrest and while he was in custody elsewhere."

Appellant's brief contains dozens of citations of some of the leading cases of the Supreme Court of the United States and of this Court relating to search and seizure, but he neglects to point out any particular exhibit of which he complains or where it may be found in our record. We review a record containing more than a thousand pages and there is not a single reference in appellant's brief to any particular item of evidence which was introduced over any specific objection or where in the voluminous record it came into evidence.

It is obvious that appellant has failed to comply with Art. 40.09, Sec. 9, Vernon's Ann. C.C.P.; Ballew v. State. 452 S.W.2d 460, 461 (Tex.Crim.App. 1970); Simmons v. State, 504 S.W.2d 465, 474 (Tex.Crim.App. 1974).

Moreover, an independent examination of the record discloses that the objection now sought to be raised by appellant was in no manner presented to the trial court. Consequently, nothing is presented for review. Reynolds v. State, 506 S.W.2d 864, 866 (Tex.Crim.App. 1974); Jackson v. State, 494 S.W.2d 550 (Tex. Crim. App. 1973).

The State's case was made out through the introduction of exhibits numbered one through fourteen. Since the constitutional question is presented so vigorously, we have made a long and tedious search of the record and now summarize our findings: (1) Exhibits numbered

1, 4, 6, 7, 11, 12, 13 and 14 were introduced into evidence without objection of any kind; (2) Exhibits numbered 2 and 3 were objected to only upon the ground that they did not depict the original of the exhibit—not the present complaint; (3) No. 5 was objected to because it was extraneous, immaterial, and had no bearing on the offense for which appellant was on trial; and (4) numbered exhibits 8, 9, and 10, were objected to because they were not material.[1]

Assuming, arguendo (but without deciding the question) the search of appellant's premises which revealed the exhibits just discussed was not warranted by the order obtained by the agents, no error is disclosed. Objections to a search are waived when fruits of the search are introduced without objections. Gutierrez v. State, 423 S.W.2d 593, 596 (Tex.Crim.App. 1968); Mortier v. State, 498 S.W.2d 944, 945 (Tex.Crim.App. 1973); Gibson v. State, 516 S.W.2d 406; 409 (Tex. Crim. App. 1974).

Appellant's ground one was not preserved in the trial court nor presented in accordance with our statutes and decisions upon appeal; accordingly, it is overruled.

In his second ground of error, appellant asserts that he was entitled to an instructed verdict at the close of the State's case because of fatal variance between the allegata and the probata in that the indictment charged the sale of amidone and the proof showed a sale of dolophine. The short answer to appellant's contention is that the proof of the State's expert witness, a trained chemist,

1. Such a general objection amounts to no objection at all. Russell v. State, 468 S.W.2d 373, 374 (Tex.Crim.App. 1971); Vela v. State, 516 S.W.2d 176, 178 (Tex.Crim.App. 1974).

showed that amidone and dolophine were but two names for the same drug and there was no controverting evidence.

Ground two is overruled. See and compare Taylor v. State, 358 S.W.2d 124, 126 (Tex.Crim.App. 1962), wherein it was pointed out that dolophine is a registered trade name for the substance amidone mentioned in the statute then in effect.

Appellant was represented in the trial court by retained counsel and upon appeal is still represented by retained, but different counsel. The third ground of error is quoted:

> "The trial court erred in declining to quash the indictments since the Grand Jury improperly impeneled [sic] in violation of the due process and equal protection clauses of the 14th Amendment to the federal constitution."

The indictment involved in this appeal, which is only one of a series, was returned and filed on April 25, 1973; the cause proceeded to trial before a jury on July 23, 1973; the verdict finding appellant guilty was returned on July 26; the verdict fixing the punishment was returned on July 27, 1973; and the judgment was entered immediately thereafter. Sentence was deferred pending hearing on defense motions questioning defendant's sanity, but appellant was duly sentenced on February 14, 1974. Appellant's present complaint is predicated upon an instrument designated as "Motion to Set Aside Indictments" which was not filed until June 18, 1974.

Under Art. 19.27, Vernon's Ann. C.C.P., the time within which a challenge to the indictment may be made is severely restricted; and, this Court has held that the motion to set aside an indictment must be made at the

first opportunity. Valdez v. State, 408 S.W.2d 109, 111 (Tex. Crim. App. 1966), and authorities therein cited. See also, Steward v. State, 422 S.W.2d 733, 735 (Tex. Crim. App. 1968); Dumont v. Estelle (5th Cir. 1975), 513 F.2d 793, 796;[2] M. Bruder, "Pretrial Motions in Texas Criminal Courts," 9 Houston L. Rev. 641, 646 (1972).

It is clear that appellant has waived his right to challenge the validity of the composition of the grand jury which returned the indictment and ground three is overruled.

The judgment of the trial court is affirmed.

Per Curiam

Delivered January 7, 1976

2. The opinion in *Dumont* discusses the Texas rule governing waiver by failure to assert the challenge in a timely manner under the rationale of Michel v. Louisiana, 350 U.S. 91, 99, 76 S.Ct. 158, 163, 100 L.Ed. 83, 92 (1955); also discussed *Valdez, supra.*

APPENDIX "B"

IN THE
CRIMINAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS
182nd JUDICIAL DISTRICT

STATE OF TEXAS

vs.

JAMES WILLIE POINDEXTER

STATE'S APPLICATION FOR ORDER

COMES NOW, CAROL S. VANCE, District Attorney of Harris County, Texas and files this application for a court order, authorizing the District Attorney's Office of Harris County, Texas, Texas Department of Public Safety Narcotics Service and the Harris County Sheriff's Office Narcotic Division to conduct an audit of all records presently under the control of James Willie Poindexter, which is located at 8303 Gulf Freeway, Houston, Harris County, Texas, the same being a business owned and operated by James Willie Poindexter, under the name of Gulf Freeway Pharmacy.

Your applicants would further show that each of them is a public official of employee engaged in the enforcement of Article 726d P.C. and as such have the right under Section 6 of Article 726d to make inspection of all records relating to Preludin, Endurets 7 mgs., Dilaudid 4 mgs. tablets, Dolophine, 10 mg. tablets, Seconal 1½ mg. capsules and Tuinal capsule, 3 gr. and all records relating to barbiturates, narcotic drugs, amphetemaines and hypnotic drugs.

WHEREFORE PREMISES CONSIDERED, applicants pray the court to issue an order to enter upon the

premises at 8303 Gulf Freeway for the purpose of examining said records.

/s/ CAROL S. VANCE
Carol S. Vance
District Attorney
Harris County, Texas

By /s/ C. H. DUVALL
C. H. Duvall
Assistant District Attorney
Harris County, Texas

IN THE
CRIMINAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS
182nd JUDICIAL DISTRICT

STATE OF TEXAS

vs.

JAMES WILLIE POINDEXTER

ORDER

On this the 8th day of May, 1973, came to be heard the foregoing application of Carol S. Vance, District Attorney of Harris County, Texas, seeking an order to inspect records under the control and custody of James Willie Poindexter at 8303 Gulf Freeway, Houston, Harris County, Texas. Said records relating to barbiturates, narcotic drugs, amphetemaines and hynotic drugs and after considering the same and having heard the testimony and evidence submitted by the parties herein the court is of the opinion that the same should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Carol S. Vance, The Department of Public Safety Narcotics Service and the Harris County Sheriff's Office Narcotics Division is hereby authorized to enter upon the premises at 8303 Gulf Freeway, Houston, Harris County, Texas for the purpose of examining, inspecting and copying all records there found relating to barbiturates, narcotic drugs, amphetemaines and other hypnotic drugs.

SIGNED AND ENTERED on this the 8th day of May, 1973.

/s/ LEE DUGGAN, JR.
Judge Presiding